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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-893

IRVING SULMEYER and ARNOLD L. KUPETZ,
Co-Trustees in Bankrupty for
Bubble-Up Corporation,
Petitioners,

vs.

THE COCA COLA COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

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Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered on July 11, 1975, which affirmed the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, denying motions for judgment notwithstanding the verdict and for a new trial.

OPINIONS BELOW

The opinion of the Court of Appeals review of which is sought is reported at 515 F.2d 835 and is set forth as Appendix A to this petition.

The unreported opinion and order of the District Court is set forth as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 11, 1975. A timely petition for rehearing was filed on July 25, 1975 and denied on September 24, 1975 [Appendix C to this petition]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and Rules 50 (a) and (b) of the Federal Rules of Civil Procedure. The statutes and rules are set forth as Appendix D to this petition.

QUESTIONS PRESENTED FOR REVIEW

1. Are agreements to divide markets in the soft drink industry immunized from the antitrust laws by reason of their historical use?
2. Are certain practices in the soft drink industry, including tying arrangements and group boycotts, immunized from the antitrust laws on the ground that they are necessary because of existing agreements to divide markets?
3. Are the Coca Cola bottlers, the dominant bottlers in the soft drink industry, sufficiently distinct to constitute a relevant customer market under Section 2 of the Sherman Act?
4. May a Court of Appeals constitutionally refuse to decide an important question of federal law which was erroneously decided by the trial court on motions for directed verdict and judgment n.o.v.
5. Is an erroneous instruction on trebling coupled with an erroneous argument by defense counsel that: "So, instead of asking for $20,000,000 he's asking for $60,000,000 . . . it goes to the vultures and jackals . . . what he is asking you to do is to make a multi-millionaire out of the vultures and the jackals . . . Did the vultures and the jackals buy a $60,000,000 dollar bonanza . . . as soon as I began to talk in the plaintiff's terms about $6,000,000 here and $9,000,000 there and $25,000,000 there and $60,000,000 there, I somehow feel as though I have been edged over into a territory in which I do not want to stand at all. The evidence does not support a *verdict* for the plaintiff", incapable, *as a matter of law,* of prejudicing an antitrust plaintiff?

STATEMENT OF THE CASE

A. The Nature of The Case

This is a private antitrust suit brought by petitioners against respondent under Sections 4 and 16 of the Clayton Act [15 U.S.C. §§ 15, 26] to secure damages and

injunctive relief for violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2].

B. Material Facts

Until 1970, Bubble Up Corporation was an Illinois corporation engaged in business as a manufacturer of a lemon-lime soft drink syrup and concentrate. In connection with that business it licensed persons to bottle, distribute and sell its lemon-lime syrup and concentrate under the registered trademark BUBBLE UP throughout the United States.

The Coca Cola Company is a Delaware corporation which is, *inter alia*, engaged in the business of manufacturing and bottling soft drink syrups and concentrates under its registered trademarks, including COCA COLA, SPRITE, FANTA, and TAB, throughout the world. It also licenses others to bottle soft drink syrups and concentrates under its trademarks.

From 1886 until 1892 Coca Cola syrup was sold throughout the United States directly to soda fountains without any restriction on the type of container in which or customer to whom the syrup could be resold.

In 1892 the Coca Cola Company was formed as a corporation and in that year the Company entered into an agreement with the firm of Seth W. Fowle & Sons to divide the United States territory in which each would sell Coca Cola syrup. This was the first division of territory. There was still no restriction on the type of container in which the syrup could be resold. Some purchasers mixed the syrup with soda water and ice for consumption at the drug store fountain; some bottled Coca

Cola syrup with soda water to drink at picnics and at the ball park.

In 1899 the Coca Cola Company, in addition to selling to soda fountains, contracted to sell its syrup to two Chattanooga lawyers, B. F. Thomas and J. B. Whitehead, on the express conditions that, absent its written consent, the syrup could be resold only in the United States and only as a bottled drink and would not be resold in competition with Coca Cola Company sales to soda fountains, or, as a bottled drink, or otherwise, in the Fowle & Sons territory. This was the second division of territory and the first restriction on the type of container in which Coca Cola syrup could be resold.

Thomas and Whitehead began bottling Coca Cola in December, 1899. In 1900 they agreed between themselves to divide the territory in which they would sell the bottled Coca Cola drink. Thomas took 17 central and eastern states plus California, Oregon and Washington; Whitehead took the rest of the United States.

Between 1900 and 1972 Thomas and Whitehead and their various corporate successors acted together and agreed with over 1000 independent bottlers, including the Coca Cola Company in its capacity as a bottler, to divide, sub-divide and redivide the geographic area in which each bottler would, to the exclusion of all other purchasers of Coca Cola syrup, be allowed to make sales of bottled Coca Cola.

These agreements between bottlers to divide territory and customers were continuously participated in and enforced by the Coca Cola Company at the insistence and for the benefit of the bottlers, and for itself in its ca-

pacity as a bottler, from 1900 to and including the time of trial.

By 1934, the Coca Cola territories had little, if any, relationship with the geographic configuration of the market bottlers could economically serve. The advent of freeways, supermarket warehousing, improvements in bottling machinery, radio and, especially, television had each acted to significantly expand the area in which a bottler could, absent an agreement to divide territory, profitably sell a bottled soft drink.

By 1935 Coca Cola bottlers were combining, with the knowledge of the Coca Cola Company, to split the bottling of certain sized bottles of Coca Cola among their respective territorial operations on a regional basis.

By 1939, groups of Coca Cola bottlers were, because of their agreements prohibiting sales of Coca Cola outside their respective territories, combining to pool their money for purposes of advertising Coca Cola on television and were engaged in "cross bottling" or "contract bottling" with other Coca Cola bottlers for various Coca Cola Company soft drinks.

The Coca Cola bottlers are a unique and distinct system of soft drink distribution within the United States. They have divided territory between themselves in such a way as to create irreconcilable conflicts in distribution between themselves and other soft drink bottlers, including the Pepsi and Seven Up bottler systems. They are dealt with by persons in the industry, including manufacturers of soft drink syrups and concentrates, soft drink equipment and supply companies and other bottlers as a separate market. The Coca Cola bottlers were identified as being engaged in a "difference business" than other bottlers and were identified historically as being the number one target for new soft drink brands because of their status as "bastions of financial strength" and their overwhelming dominance in the soft drink industry. These bottlers act together on an exclusive basis to spend hundreds of millions of dollars in advertising and promoting their common soft drink products and engage in bottling each other's soft drink products to the exclusion of other products. Coca Cola bottlers generally label their soft drink bottles as their property making those bottles unfit for use by competing bottler systems.

In the late 1950's the Coca Cola bottlers demanded a lemon-lime drink. The Coca Cola Company did not supply that demand. Consequently, Bubble Up filled the void so that, by 1960, it had licensed its drink to 350 to 400 Coca Cola bottlers. By 1960 the Coca Cola Company viewed Bubble Up as a threat to its control of the Coca Cola bottler distribution system and as "shaking the confidence of bottlers in Coca Cola."

In response to Bubble Up's threat, the Coca Cola Company began bottling and selling, and exclusively licensing Coca Cola bottlers to bottle and sell, lemon-lime soft drink syrup and concentrate under the trademark Sprite. In introducing Sprite in 1961 the Coca Cola Company relied upon the territorial restrictions and divisions between bottlers which had regulated the sale of bottled Coca Cola since 1892. Specifically, in each intance, the Sprite bottling contract was by agreement with the bottler fixed to and made to exactly conform with the ancient Coca Cola bottling territories.

Since, according to the Coca Cola Company, the introduction of Sprite required the heavy use of television advertising and since, as noted by the trial court, "The television signal area usually extended *beyond* any one bottler's territory", any relationship between the Sprite territory and the market in which a bottler could profitably make Sprite sales was absent at the outset.

Even though the bottlers continued to adhere to the agreements between themselves to divide sales territories, and to enforce those agreements through the Coca Cola Company, they joined on a regional basis in what the Coca Cola Company called "natural marketing areas" to advertise and promote both Coca Cola and Sprite as a group. Some advertising and promotional cooperatives were initiated by the bottlers themselves. With respect to Sprite, however, all the group bottler programs were formulated and presented by the Coca Cola Company to bottlers for their acceptance at group bottler meetings.

The Coca Cola Company, with its treasury, vast sales force and trade relations, determined that it would be supplying Sprite to 85% of the Coca Cola bottler market within five years. In fact, it achieved 87%. In the first three years, from 1961 to 1964, Bubble Up lost over 300 Coca Cola bottlers. During this time the Coca Cola Company kept a running scorecard showing the number of Coca Cola bottlers dropping Bubble Up and further acted to destroy Bubble Up bottlers to get them "out of the trade."

The introduction of Sprite, and each Sprite advertising and marketing program from 1961 until 1972, was firmly rooted in, predicated upon and made an operational part

of the agreements between bottlers to divide markets. Each Sprite program specifically invited the Coca Cola bottlers to maintain their "sacred" agreements not to compete while simultaneously acting together and "in concert" to advertise and promote the product on the consumer level.

The various multimillion dollar programs initiated by the Coca Cola Company for Sprite and accepted by the Coca Cola bottlers were, among others:

(1) *The Investment Market Program,* pursuant to which the Coca Cola Company offered Coca Cola bottlers large amounts of extra advertising credits on the express condition that enough bottlers to cover at least 80% of any television signal area combine to take on Sprite. This program was initiated with full knowledge that bottlers who accepted it would *necessarily* drop Bubble Up;

(2) *The Cash Bonus Program,* pursuant to which the Coca Cola Company paid specified amounts of cash to Coca Cola bottlers on condition that they bottle Sprite;

(3) *The Interchange Programs,* pursuant to which the Coca Cola Company allowed Coca Cola bottlers to use substantial amounts of Coca Cola, Tab and Fanta advertising credits and money to purchase Sprite bottles and to advertise Sprite;

(4) *The Co-operative Advertising Programs,* pursuant to which the Coca Cola Company offered substantial extra credits and monies to Coca Cola bottlers on the express condition that the bottlers combine to advertise Sprite;

(5) *The Equipment Lending Program,* pursuant to which the Coca Cola Company made available 30 million dollars worth of soft drink dispensing equipment on the condition that the bottlers dispense Coca Cola Company soft drinks, and;

(6) *The 100% Program,* pursuant to which the Coca Cola Company offered to pay for all the introductory and consumer advertising for a Coca Cola bottler for 2 years if he introduced Sprite. (This program could amount to as much as $2,000,000 for one major bottler. The program was initiated in 1965 as a "last ditch effort" to convert the remaining 15% of Coca Cola bottlers to Sprite).

Bubble Up claimed, among other things, that it was entitled to a directed verdict on the issue of Coca Cola's unlawful market divisions, reserving the issues of causation and damages for the jury. The trial court "temporarily" overruled the motion to "allow evidence to be presented" by the Coca Cola Company and "if it became evident later, I could go ahead and take that action." (Vol. 21, p. 23). The issue of Coca Cola's liability on the territorial agreements was again raised by Bubble Up on motion for judgment notwithstanding verdict. The trial court, in denying the motion, began by saying that "A motion for judgment notwithstanding the verdict in effect renews an earlier motion for directed verdict. . . ." (Appendix A, p. 11). The trial court then agreed that the territorial restrictions, whether construed as horizontal or vertical, were *per se* unlawful; but denied Bubble Up's motion on this issue on the ground that the jury found that Bubble Up had not been *injured* "as a direct result of the *violations* committed by the defendants."

REASONS FOR GRANTING THE WRIT

A. Conflict Between the Circuits and with the Decisions of This Court—Agreements to Divide Sales Markets.

The decision of the Court of Appeals leaves standing the trial court's ruling that agreements between competitors to divide markets in the soft drink industry are not unlawful *per se* and is in direct conflict with the decisions of this Court in *Addyston Pipe and Steel Company v. United States,* 85 F. 271 (1898), *aff'd.* 175 U.S. 211 (1899); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951); *United States v. Arnold Schwinn & Co.,* 388 U.S. 365 (1967) and *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972).

The decision of the court below, affirming the trial court's denial of Bubble Up's motion for a directed verdict is also in direct conflict with the recent decision of the United States Court of Appeals for the Ninth Circuit in *Noble v. McClatchy Newspapers,* ..... F.2d ....., November 14, 1975, which held agreements to divide markets unlawful *per se.*

The *only* ground relied upon by the trial court in sanctioning the agreements to divide markets was that the *jury* found that Bubble Up had not been *injured* "as a direct result of the *violations* committed by the defendant." Petitioners submit that the interposition of such a purported "ground" manifestly begs the question as to whether the horizontal and vertical agreements violate the Sherman Act as a matter of *law,* and in such a departure from the accepted and usual course of judicial proceedings as to require an exercise of this Court's power of supervision.

B. The Refusal of the Circuit Court to Decide the Territorial Questions.

The Court of Appeals did not rule upon or even mention the proven *horizontal* agreements to divide territory upon which the trial court had expressly ruled in denying Bubble Up's motion for judgment n.o.v.

The agreements to divide markets were raised in the pre-trial statement and made a part of the final pre-trial order. Both parties offered substantial evidence, admitted by the Court, respecting the agreements to divide territories and the agreements were the subject of extensive oral argument and briefing by the parties prior to the close of plaintiff's case. The agreements were specifically mentioned in Bubble Up's motion for a directed verdict. Further, *both* the horizontal *and* vertical territorial restrictions were *actually considered* and *ruled upon* by the trial court *after* it had correctly observed that "a motion for judgment notwithstanding the verdict in effect *renews* an earlier motion for directed verdict" [emphasis added].

The refusal of the Court of Appeals to consider or rule upon *either* the horizontal or the vertical territorial restrictions effectively denied Bubble Up its right of appeal and constitutes a gross and intolerable departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

C. The Propriety of Instruction and Argument on Treble Damages—an Important Federal Question.

The Court of Appeals held as a *matter of law* that an antitrust plaintiff could not be prejudiced by instruction

and argument on treble damages. This question has not been but should be settled by the Court. The circuit courts are in conflict on the question of whether an instruction on trebling is error, compare *Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361 (10 Cir. 1972) with *Bordonaro Bros. Theaters v. Paramount Pictures,* 203 F.2d 676 (2d Cir. 1953).

The decision below is the only one known to petitioners that holds instruction and argument on treble damages incapable, as a matter of *law,* of prejudicing an antitrust plaintiff. The decision of the trial court, affirmed by the Court of Appeals, to allow defendant to put the matter of trebling before the jury resulted in a defense argument against the return of a *verdict* because Bubble Up was seeking a "60 million dollar bonanza." The trial court did not even consider whether this argument prejudiced plaintiff "since the jury did not reach the question of *damages*". The Court of Appeals held the instruction and argument to be harmless because the jury had found no *violation,* in direct conflict with its holding in *Pollock & Riley, Inc. v. Pearl Brewing Co.,* 498 F.2d 1240 (5th Cir. 1974) that a trebling instruction *alone* constituted error because:

> "The justifiable fear of antitrust plaintiffs is that the juries will adjust the damage award downward *or find no liability,* therefore thwarting Congress's purpose . . ." *Id.* at 1242.

This whimsical, *ad hoc* approach to a substantial question of federal law which carries the potential of thwarting the purpose of Congress should be put to a stop.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

Dated, San Francisco, California,
December 22, 1975.

Respectfully submitted,
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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals,
Fifth Circuit.

No. 73-2231

Irving Sulmeyer and Arnold L. Kupetz,
Co-Trustees in Bankruptcy for Bubble
Up Corporation,
Plaintiffs-Appellants,

vs.

Coca Cola Company,
Defendant-Appellee.

[July 11, 1975.]

Before THORNBERRY, COLEMAN and ROSENN*, Circuit Judges.

THORNBERRY, Circuit Judge:

Irving Sulmeyer and Arnold Kupetz, Co-trustees in Bankruptcy for the Bubble Up Corporation, appeal the trial court's denial of their motion for judgment notwithstanding the verdict in their antitrust suit against the Coca Cola Company.[1] Alternatively, they claim that the

*Of the Third Circuit, sitting by designation.

[1]For convenience, we will refer to the appellants as the Bubble Up Corporation.

trial court erred in denying their motion for a new trial. The trial court's rulings followed an eight week jury trial that ended with a general verdict for Coca Cola Company. We have carefully examined Bubble Up's numerous claims of error, and have concluded that Bubble Up had ample opportunity to develop its antitrust claims in the court below. The trial court properly submitted the case to the jury on instructions satisfactory to Bubble Up, and substantial evidence supports the jury's verdict in Coca Cola's favor. Therefore we affirm the trial court's actions in denying both post-trial motions.

I. BACKGROUND

A. *The Lemon-Lime Soft Drink Market.*

Bubble Up Corporation manufactures a lemon-lime soft drink syrup that it sells to franchised bottlers. They bottle the syrup in accordance with Bubble Up's standards, and deliver the finished product to retailers for distribution to the ultimate consumers. Other soft drink syrup manufacturers market their products in a similar fashion. By the late 1950's, Coca Cola, Pepsi Cola, and Seven Up had effectively achieved nationwide distribution at the consumer level for their soft drinks. Each had done so through a series of franchise agreements with independent bottlers across the nation. Thus each company had franchised a distinct group of independent bottlers, though evidence indicated that some bottlers handled both Coca Cola and Seven Up.[2] Seven Up was the dominant seller

[2]Coca Cola and Pepsi Cola did not franchise the same bottlers. The two cola products directly compete at the consumer level. A bottler with a dual franchise might be hesitant to strongly promote one cola product over the other, with competitive detriment to both

of lemon-lime soft drinks and was Bubble Up's chief competitor at the consumer level.[3]

Bottler profits vary as a direct function of consumer demand. Since substantial nationwide demand for Seven Up had developed, Bubble Up would have been hard pressed to convince a bottler franchised for Seven Up to change to a Bubble Up franchise. The company chose to avoid head to head competition with Seven Up for lemon-lime bottler franchises, and sought to achieve nationwide distribution through franchise agreements with bottlers holding Coca Cola or Pepsi Cola franchises.

In 1960 Bubble Up made a major corporate decision. Dissatisfied with efforts to achieve national distribution using both Coca Cola and Pepsi Cola franchisees, the company decided to seek to franchise Coca Cola bottlers exclusively. At about the same time the Coca Cola Company decided to market its own lemon-lime product—Sprite. In the end Bubble Up's efforts to achieve nationwide distribution through the bottlers franchised for Coke fizzled.

B. *The Coca Cola Company's Entry Into the Lemon-Lime Market.*

Dr. John S. Pemberton formulated the original Coca Cola syrup and extract in 1866 in Columbus, Georgia. He

syrup manufacturers. To the extent that the lemon-lime segment of the soft drink market comprises a separate set of consumers, this conflict is lessened. Non-cola soft drinks and cola products are sufficiently competitive at the consumer level, however, to make dual franchises for Coca Cola and Seven Up relatively rare.

[3]In the late 1950's, Seven Up began to increase its share of the total soft drink market, taking advantage of its ability to satisfy increased consumer demand for lemon-lime soft drinks.

and J. M. Robinson began to distribute the product in Atlanta, Georgia. Pemberton fell ill and died in 1888. Asa G. Candler, a former competitor, acquired all rights to the product by April 1891, and in 1892, transferred those rights to the Coca Cola Company, a newly formed Georgia corporation, in exchange for stock. Originally, the company sold its product to fountain retailers who mixed the syrup with carbonated water at the retail outlet for direct sale to the ultimate consumer. Around 1900 independent bottlers were licensed to mix and bottle the drink, then sell it to retailers. A nationwide system of franchised bottlers developed and that system became the primary channel for distribution of Coca Cola to retail outlets for sale to the consumer.

Through World War II, Coca Cola concentrated exclusively on selling its basic product, Coca Cola syrup, to the franchised bottlers. Then a shift in soft drink demand occurred, with consumers willing to purchase a more varied assortment of soft drinks. The demand shift at the consumer level produced a corresponding shift in bottler demand. Independent bottlers holding Coca Cola franchises began pressuring the Coca Cola Company to market a more varied line of syrups. Lemon-lime flavored soft drinks developed into the second largest line of soft drink flavors with Seven Up holding by far the largest share of that market.[4] A number of products competed for the consumer dollars in that market including Bubble Up,

[4]By 1960 the lemon-lime segment of the soft drink market accounted for 10.5% of total soft drink sales. Seven Up made over 80% of the total lemon-lime drink sales.

Sun Up, Uptown, and 50-50.[5] The development of soft drink lines other than cola drinks coincided with a period of rapid growth and increasing sophistication in vending machines. Bottlers sought additional flavor lines to supply a full range of products at retail vending machine outlets. Coca Cola responded to this consumer and bottler demand in 1958 with the Fanta line of soft drink products. That line included orange, grape, root beer, strawberry, ginger ale, and club soda.

Coca Cola decided to compete very actively in the lemon-lime segment of the soft drink industry in 1960. It opted to enter the market through internal expansion.[6] Coca Cola already had a nationwide system of franchised bottlers for its Coca Cola syrup. Understandably the company looked to those bottlers to handle Sprite. Several factors influenced Coca Cola in this regard. Introduction of Sprite was in some measure a response to already existing Coca Cola franchisee demand. Coca Cola employees had a working relationship with franchised bottlers that could be used to Coke's advantage in introducing Sprite at minimum expense. There would be economies of scale in using the existing field marketing organization to market the new product. And the company did not wish to deal with bottlers handling a competing cola product.

[5]Evidence indicated that other drinks competed in this submarket as well, including citrus drinks (e.g., Squirt), and various ginger ales. However, those products were really minor competitive factors. Collectively these products comprised the "green bottle" market.

[6]Fred W. Dickson's testimony indicated there was some pressure at the time to enter the green bottle market through acquisition of the Bubble Up Corporation. Record Vol. 2 at 52.

The decision to use its already existing distribution system placed Coca Cola on a collision course with Bubble Up—both companies competing to franchise the same group of independent bottlers. From 1961-66, the two companies fought rather fiercely, with Bubble Up the clear loser. Bubble Up contends that the Coca Cola Company did not fight fairly and violated Sections 1 and 2 of the Sherman Act. The jury below disagreed, but Bubble Up seeks to overturn that verdict.

II. BUBBLE UP'S MOTION FOR JUDGMENT N.O.V.

Bubble Up moved in the trial court for judgment n.o.v. on its Section 1 and 2 claims. The trial judge denied the motion, rejecting each claim that Bubble Up raised. Here Bubble Up seeks reversal, but fights an uphill battle. Generally a motion for directed verdict or judgment n.o.v. should be granted only in two situations: "First, where there is a complete absence of pleading or proof on an issue or issues material to the cause of action or defense. . . . Second, where there are no controverted issues of fact upon which reasonable men could differ." 5A Moore's Federal Practice ¶ 50.02[1] (2 ed. 1974). *Accord* Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab., Inc., 437 F.2d 1295 (5th Cir. 1971). In passing on the motion, the trial court must view the evidence in the light most favorable to the party opposing it, giving that party the benefit of all reasonable inferences in its favor. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). The standard of review at the appellate level is the same. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2524 (1971).

A. *Bubble Up's Section 1 Claims*

Bubble Up argues that it was entitled to a directed verdict on its Section 1 claims because it conclusively proved various *per se* violations.[7] Appellants challenged a number of marketing practices the Coca Cola Company employed in connection with Sprite's introduction in the early 1960's claiming they constituted tying arrangements or group boycotts—both *per se* violations of the Sherman Act.[8] The trial court denied Bubble Up's motions for a directed verdict and judgment n.o.v. on those claims. It did, however, instruct the jury as to boycotts and tying arrangements, but the jury's verdict rejected Bubble Up's Section 1 claims. We find the district court properly denied Bubble Up's motions as the evidence does not conclusively demonstrate any Section 1 violations.

1. *The Investment Market Program:*

Bubble Up directs the major thrust of its Section 1 attack against the Investment Market Program Coca Cola employed from 1961 to 1963. We examine this program in some detail as our disposition of the Section 1 arguments

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[7] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1.

[8] Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) (tying arrangements); United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966) (group boycotts).

here helps answer Bubble Up's attack on various other Coca Cola Company programs.[9]

To successfully market Sprite nationwide, the Coca Cola Company had to do two things: (1) stimulate sufficient consumer demand to make production economical; and (2) develop an effective delivery system. Coke already had a nationwide distribution system for its primary product, Coca Cola. It decided to look to the network of Coca Cola franchised bottlers to establish a nationwide distribution system for Sprite. To stimulate consumer demand for the new product, Coke developed an advertising program that made extensive use of television.

During the late 1950's television replaced radio as the dominant advertising medium. Though extremely effective, it was also extremely expensive.[10] The Coca Cola Company commissioned the McCann-Erickson Advertising Agency of New York City to develop a comprehensive

[9]The Sherman Act's statute of limitations apparently bars Bubble Up's Section 1 challenge to the Investment Market Program. 15 U.S.C. § 15b provides in pertinent part: "Any action to enforce any cause of action under sections 15 and 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued." The Coca Cola Company discontinued the IMP in October 1963, and Bubble Up did not file its complaint until January 2, 1968. Bubble Up seeks to avoid the statute of limitations bar by claiming that Coca Cola engaged in a continuing course of exclusionary conduct. We doubt the validity of that approach here. See Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). However, we reach the merits of Bubble Up's challenge to the IMP because of its relevance to the intent issues in the Section 2 charge.

[10]*See* Note, Advertising and Shared Monopoly in Consumer Goods, 9 Colum. J. Law & Soc. Prob. 241, 253-55 (1973).

advertising program for Sprite using the new medium. Through a computer study the agency determined that an advertisement broadcast over 197 selected television stations would reach the home TV sets of most of the nation's soft drink consumers. In formulating its proposal, McCann-Erickson divided the country into 197 television marketing areas, geographically defined by the reach of the 197 television signals. Not surprisingly, the geographical territory served by the individual bottlers Coke sought to franchise for Sprite did not correspond to the 197 television marketing areas.[11]

The Sprite Investment Market Program (IMP) sought to utilize the 197 television marketing areas to stimulate demand through an effective and efficient advertising program. Under this program, when Sprite became available to 80% of the consumers in a television marketing area, the company would spend twenty cents on television advertising for every Sprite syrup gallon sold to area bottlers over a three year period. That expenditure supplemented a twenty cent per gallon advertising allowance

[11]Bubble Up asserts that the bottler territories did not correspond to the television market areas because of vertical territorial restrictions. Therefore it claims the IMP is an illegal product of those restrictions. Yet Bubble Up did not specifically make this argument at the trial, nor did it request jury instructions on this theory. See Section II.A.2., *infra*.

The trial evidence on the point is sketchy. Bottler territorial limitations are a function of factors like plant capacity, delivery truck range, available labor force, etc. The designated television marketing areas for advertising were a function of the power of the area TV transmitter. It seems doubtful that bottler territorial limitations had any impact on the advertising program for Sprite. Certainly the trial evidence on the point is not conclusive.

that each individual bottler received under the standard Sprite franchise agreement.[12]

The program contemplated substantial increases in consumer demand for Sprite in its second and third years. The company obligated itself to spend forty cents per gallon over the standard contract allowance during the first year, and an extra twenty cents per gallon in the second. Under the IMP the company would expend the extra twenty cents in the third year on gallonage in excess of first year purchases.

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[12]The price term of the standard Sprite franchise agreement read as follows:

	Price of Concentrate	Price of Syrup
Sprite	.....per unit *	.....per gallon *

*The above prices include an advertising allowance of (1) five cents (5¢) per gallon of syrup, or equivalent gallon of concentrate, which, however, can only be spent for point-of-sale material approved by Fanta Beverage Company and (2) an additional sum of twenty cents (20¢) per gallon of syrup, or equivalent gallon of concentrate, purchased by BOTTLER under this agreement shall be spent, one-half (½) of said amount on advertising or promotions mutually agreed upon by BOTTLER and COMPANY, and one-half (½) of said amount in such manner and form as Fanta Beverage Company deems desirable.

Additionally the contract obligated the bottler "To vigorously promote the sale of the Beverage [Sprite] through the preparation or formulation of sales, advertising and promotional plans and to spend reasonable sums therefor." Thus in performance of his obligation to vigorously promote Sprite through advertising, the franchisee could apply five cents of the purchase price of a gallon of Sprite syrup or concentrate equivalent to purchase point of sale advertising material. An additional twenty cents per gallon was spent for other advertising or promotions.

Under the contract provision the bottler had partial control over the expenditure of one half of the twenty cent allowance. Trial testimony indicated however that in practice the Coca Cola Company exercised complete control over the entire contract advertising allowance during the existence of the IMP.

> Q Now, the advertising, of course, this is advertising that Coca-Cola spends to advertise the product?
>
> Coca-Cola doesn't give the money over to the bottler, right?
>
> A No.

Testimony of Thomas C. Law, Record Vol. 22 at 119.

Coke based its initial outlay in a given marketing area on the total estimated first year gallon purchases of that area's Sprite bottlers. If Coca Cola's first year estimate was 30,000 gallons, the company would spend a total of $18,000 to advertise Sprite over that area's television station. Of the total, $12,000 represent advertising purchased under the IMP, while the twenty cents per gallon contract allowance would account for the remaining $6,000. The company estimated the initial outlay for the second and third years in a similar fashion, but took actual past sales experience into account.[13] Bubble Up seeks to bring this program within the Sherman Act's definition of a tying arrangement.

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[13]The IMP was not particularly successful in practice. The Coca Cola Company counted on the increase in Sprite gallon sales for the second and third years of the program to keep actual advertising expenditures relatively constant over the IMP's lifespan. As former Coca Cola executive Thomas C. Law explained, this did not occur.

> And it didn't work for a very good reason. . . .
>
> There wasn't enough advertising because, for example, let's say the bottler is going to do 10,000 gallons of syrup the first year. We were going to spend 60 cents a gallon. That would mean we would spend $6,000.
>
> The second year, we were only going to spend 40 cents a gallon. So, in order to spend the $6,000, the bottler would have to do 15,000 gallons, 15,000 times 40 cents is $6,000 again. So, again as much syrup. He would have to have a 50 percent increase in business in order to have $6,000 advertising.
>
> The third year we were only going to spend 20 cents. On the third year he had to do 30,000 gallons of syrup in order for us to spend $6,000.
>
> . . . . .
>
> Cost was going up. Cost of television advertising was getting higher.
>
> So, we were faced with a situation where the bottler had to have a 50 percent increase the second year and had to double his business the third year in order for us to have the same amount of advertising dollar.
>
> Well, obviously, this didn't work, because he just didn't do that. The product didn't grow that fast, and the television cost

In Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1953), the Supreme Court defined a tying arrangement as: "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . . ." 356 U.S. at 5, 78 S.Ct. 518. Tying agreements are regarded as illegal *per se* because they curb competition on the merits in the tied product. Standard Oil Co. of California v. United States, 337 U.S. 293, 305-06, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). "They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market." Northern Pac. Ry. Co. v. United States, *supra* 356 U.S. at 6, 78 S.Ct. at 518. An illegal tying arrangement has four basic characteristics: (1) two separate products (the tying and the tied product); (2) sufficient economic power in the tying market to coerce purchase of the tied product; (3) involvement of a not insubstantial amount of interstate commerce in the tied market; and (4) anticompetitive effects in the tied market.[14] Driskill v. Dallas Cowboys Football Club, Inc., 498

went up, now [sic] down, and, as you did more business, you would need more advertising.

So, as soon as we could we did away with investment market. We abandoned it.

Record Vol. 16 at 22-24.

Actually Mr. Law is incorrect about the increase necessary for the third year. A bottler would have to increase purchases to 20,000 gallons rather than 30,000 to achieve the $6,000 figure. *See* text following n.12, *supra*.

[14]Both Sherman Act § 1, 15 U.S.C. § 1 (1970), and Clayton Act § 3, 15 U.S.C. § 14 (1970), prohibit tying arrangements. But § 3 only applies where both the tying and the tied products are "goods, wares, merchandise, machinery, supplies, or other commodities." The standards of proof under the two sections differ. To establish an illegal tying arrangement under § 1, the antitrust plaintiff must show (1) sufficient economic power in the tying product to appreciably restrain competition in the tied product, *and* (2) that the tying arrangement affects a not insubstantial amount of interstate commerce. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). But under § 3, the plaintiff succeeds if he establishes either of the above elements. *Id. See also* Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970); Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 74 Harv.L.Rev. 50, 55-59 (1958); Comment, Franchise Tie-Ins and Antitrust: A Critical Analysis, 1973 Wis.L.Rev. 847, 851-55.

F.2d 321 (5th Cir. 1974); Coniglio v. Highwood Services, Inc., 495 F.2d 1286, 1289 (2d Cir. 1974).

It is clear that Bubble Up's attempt to characterize the IMP as an illegal tying arrangement must fail. Coca Cola Company was the sole manager of the IMP funds. It was Coke that negotiated with the television stations for the purchase of advertising time. The individual bottlers had no voice in determining the advertisements' content or time slots.[15] Nor did they handle any funds spent under the program. Coca Cola determined which bottlers qualified for the IMP in a given area. The individual bottler obviously benefited from the additional advertising, but he did not "purchase" it.[16] Thus the tying

[15]Given the economics of television advertising, an individual Sprite bottler could not economically conduct a television advertising program in his bottling territory. Television advertising has significant economies of scale, and large national advertisers can obtain the most favorable time slots, and get quantity discounts on advertising purchases. Note, Advertising and Shared Monopoly in Consumer Goods, 9 Column. J. Law & Soc. Prob. 241, 254-55 (1973).

[16]*Cf.* Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955, 92 S.Ct. 1172, 31 L.Ed.2d 232 (1972) (franchisee could obtain franchise only if they agreed to purchase franchisor's cookers, fryers, paper packaging supplies, and spices); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), cert. dism'd, 381 U.S. 125, 85 S.Ct. 1364, 14 L.Ed.2d 284 (1968) (franchisee required to purchase all store equipment and supplies from franchisor). Coca Cola Company advertising purchases actually defrayed business expenses that the bottler might otherwise

arrangement cases that Bubble Up cites are inapposite to this situation.

Bubble Up also seeks to characterize the IMP as a group boycott or a concerted refusal to deal—another *per se* violation of Section 1. United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); Fashion Originator's Guild v. Federal Trade Comm., 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1915). We find that Bubble Up Corporation has failed to conclusively demonstrate that the IMP falls within the group boycott definition.

A comparison between the IMP and the practices involved in *Klor's Inc.* is illustrative. Broadway-Hale Stores, Inc., a department store chain, operated a branch store next door to Klor's Inc., a small San Francisco appliance store. Klor's alleged that Broadway-Hale conspired with major appliance manufacturers and distributors either not to sell to Klor's or to sell at discriminatorily high prices, putting Klor's at a severe competitive disadvantage. The Supreme Court reversed a summary judgment in favor of Broadway-Hale, holding that the allegations

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have incurred to effectively market Sprite in his area of operations.

Our disposition of Bubble Up's tying arrangement claim obviates any consideration of Coca Cola's contention that Sprite syrup and Sprite advertising really are one product for antitrust purposes. *See* Kugler v. AAMCO Automatic Transmissions, Inc., 460 F.2d 1214 (8th Cir. 1972); United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (E.D.Pa. 1960), aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961).

sufficiently described a group boycott or concerted refusal to deal that was illegal *per se*.

Under the Investment Market Program, the Coca Cola Company agreed to purchase additional television advertising in a given television marketing area once Sprite was available to 80% of the consumers there. Coca Cola did not require bottlers to discontinue Bubble Up to gain the additional advertising. Cf. United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). Bubble Up presented evidence on the economic impracticality of bottling two lemon-lime products, arguing that the necessary effect of the arrangement was an agreement to refuse to deal with Bubble Up. But the absence of an explicit agreement to exclude Bubble Up made the purpose of the IMP a jury question, and substantial evidence supports their verdict in Coca Cola's favor. See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970).

The absence of a *per se* violation makes the issue the reasonableness of the IMP. Coca Cola offered economic justifications for the program sufficient to support the jury's implicit finding of reasonableness. In the soft drink industry, a large scale advertising program is essential to build consumer acceptance of a new product. The expense of such a program presents a substantial barrier to entry. The Sprite television advertising program was the Coca Cola Company's solution to the problem of entry into the green bottle market. An individual advertisement would reach a given number of potential customers in the

geographical area covered by the television station's signal. But if Sprite were not available at local retail outlets, the resultant buyer frustration would offset the demand the advertisement had stimulated. Under the IMP Coca Cola would not make the substantial extra expenditures in a television marketing area until satisfied that sufficient distribution capacity existed to meet the consumer demand generated.

The IMP was not so clearly exclusionary as to warrant *per se* treatment under Section 1. Bubble Up could still reach the soft drink consumer through franchise agreements with other independent bottlers. Other evidence indicated the effect of the IMP was to increase competition on the green bottle market at the consumer level. Given the relevant economics, the jury could properly have found the 80% requirement reasonable. Bubble Up was not entitled to a directed verdict or judgment n.o.v. on the Section 1 claim against the IMP.

2. *Vertical Territorial Restrictions*

Bubble Up also claims injury resulting from vertical territorial restrictions that Coca Cola Company imposed on its franchised bottlers. It is true that in almost all cases vertical territorial restrictions imposed by the manufacturer of a product after he has parted with dominion over it are illegal *per se*. United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856-1865, 18 L.Ed.2d 1249 (1967). As our Circuit noted in Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975), "[n]otwithstanding, Standard Oil Co. v. United States, 1911, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, *Topco* [United

States v. Topco Assoc., Inc., 1972, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515] and *Schwinn* [United States v. Arnold Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249] read together, suggest that at this point we must accept the fact that the Court has set its face against both horizontal and vertical territorial restrictions, with the possible exception of vertically imposed restrictions by 'new entrants' and 'failing companies' briefly mentioned in *Schwinn*." 506 F.2d at 943. But the record clearly forecloses this challenge.

In the district court, Bubble Up argued that certain Coca Cola Company marketing practices constituted *per se* violations of the Sherman Act. But, the *per se* violations alleged were group boycotts and tying arrangements; Bubble Up never mentioned vertical territorial restrictions. Bubble Up moved for a directed verdict after presenting its own case, and renewed that motion at the close of all the evidence. Not once did Bubble Up mention vertical territorial restrictions in those motions. Further, Bubble Up did not object to the trial court's jury instructions for failure to instruct on vertical territorial restrictions, and did not mention them in its own proposed jury instructions. Bubble Up finally complained of the territorial restrictions in its brief supporting the motion for judgment n.o.v.

Under Fed.R.Civ.P. 50, "[a] motion for directed verdict shall state the specific grounds therefor." Fed.R.Civ.P. 50(a). If denied, a party may move within ten days after entry of judgment "to have the verdict and any judgment entered thereon set aside and to have judgment entered *in accordance with his motion for a directed verdict . . .*"

Fed.R.Civ.P. 50(b) (emphasis supplied). "A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, must state the grounds on which it was made. Since it is technically only a renewal of the motion for a directed verdict made at the close of the evidence, it cannot assert a ground that was not included in the motion for a directed verdict." 9 C. Wright & A. Miller, Federal Practice and Procedure § 2537 (1971). *Accord* House of Koscot Dev. Corp. v. American Line Cosmetics, Inc., 468 F.2d 64 (5th Cir. 1972). Having failed to assert claims based on vertical territorial restrictions during the trial, Bubble Up was not entitled to raise those issues in its motion for judgment n.o.v.[17]

3. *Other Section 1 Claims*

Bubble Up also claims that other Coca Cola Company marketing practices constituted *per se* violations of Section 1. We consider these programs separately.

a. *The Equipment Lending Program*

In 1965, the Coca Cola Company began to loan fountain syrup dispensing equipment to high volume retailers.[18]

[17]It would be a constitutionally impermissible re-examination of the jury's verdict for the district court to enter judgment n.o.v. on a ground not raised in the motion for directed verdict. *Compare* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 55 S.Ct. 890, 79 L.Ed. 1636 (1935) *with* Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879 (1913).

[18]Wilson B. Franklin, Vice President of Coca Cola USA and manager of the fountain sales department, testified that Coca Cola initiated this program purely in response to competitors' similar programs. Record Vol. 23 at 136-37. Coca Cola did not use the program in areas where competitors were not employing it, and would discontinue it in areas where rival soft drink companies abandoned their programs. Record Vol. 23 at 140-41.

The machinery involved dispensed post-mix products,[19] and Coca Cola required the retailer to dispense Coca Cola Company products through all but one valve. The company franchised about 4100 independent wholesalers to service the equipment. Approximately 700 franchisees were independent bottlers also franchised for Coca Cola.[20]

Bubble Up claims that this program is *per se* illegal, but fails to articulate the rationale for that conclusion. We cannot perceive one. The company did not require the retailer to cease selling any product to gain the benefits of the program. Nor did the company forbid the retailer from using other post-mix equipment for competing products. One effect of the program was to increase the number of post-mix products the retailer could sell to the consumer. This competitive benefit is hardly a characteristic of a *per se* illegal practice.

Bubble Up gave its franchised bottlers the right to sell to fountain outlets, while Coca Cola had traditionally retained for itself the right to sell to the fountain trade. In

[19]Post-mix products are soft drinks mixed and dispensed on retail outlet premises with post-mix equipment. Mr. Franklin explained the mechanics of a post-mix system:

> Post-mix equipment is equipment that can take the syrup, whether it would be Coca-Cola syrup or any other syrup, they have a carbonating unit, a refrigerating unit, and a dispensing mechanism, those are the three basic components, from which they can dispense the drink then one at a time. That mechanism may be a one-drink unit, two-drink unit, three-drink unit, four-drink unit.

Fast food operations such as McDonald's, Burger Chef, or Burger King are typical users of a post-mix system.

[20]Bottlers with franchises to bottle Coca Cola or Sprite had no direct connection with the equipment lending program. The Coca Cola Company made the equipment lending agreements directly with the retailer. The company then contracted with fountain syrup wholesalers for maintenance, but not all Sprite or Coca Cola bottlers had franchises to wholesale syrup.

Bubble Up's view, Coca Cola initiated its program to exclude Bubble Up and to make Sprite franchises more attractive to independent bottlers. Coca Cola offered contrary testimony on the question of intent, and presented evidence that the program gave retail outlet consumers an increased number of soft drink choices. Under these circumstances, the question of the exclusionary intent and effect of the practice was for the jury. The verdict in Coca Cola's favor is clearly supported by the evidence.

b. *Cash Bonuses*

A 1964 Coca Cola Company program offered cash bonuses to bottlers for increased Coca Cola sales. Under the program, a Coca Cola franchised bottler participating in a TV co-op would receive a cash bonus of 18 cents per gallon for the amount his 1964 consumption exceeded the 1963 level. The Coca Cola Company did not restrict the use of the cash bonus, but encouraged its expenditure on advertising by offering to increase the bonus 33⅓%. The company offered increased bonuses to those bottlers handling allied Coca Cola Company products such as Sprite, Tab, or Fanta beverages. For example, a Coca Cola bottler with a franchise for Sprite received an additional 2½ cents per gallon allowance on the increased Coca Cola sales. The bonus was based purely on the increase in Coca Cola sales.

There is no tying arrangement or group boycott here. The program's primary goal was to increase Coca Cola sales. The Coca Cola Company felt that an increase in Coca Cola demand would result in increased sales of allied products as well. Record Vol. 16 at 84. Hence the Company

increased the bonus to a bottler with franchises for several Coca Cola products. The evidence indicated that the actual amount of increased bonus for a bottler with a Sprite contract was rather small, minimizing the incentive for a bottler to take on Sprite purely because of the bonus. The jury implicitly found that this practice had legitimate business purposes, and did not constitute an unreasonable restraint on trade. We see no justification for overturning that jury finding.

c. *Various Interchange Programs*

Bubble Up charges that several programs allowing a bottler franchised for more than one Coca Cola product to interchange advertising credits constituted *per se* violations of Section 1, and provided the requisite specific intent for conspiracy and attempt to monopolize under Section 2. Bubble Up implies that requiring a bottler to sign a franchise for an allied product before receiving the interchange authority creates an illegal tying arrangement. But the argument fails. A Coca Cola franchisee could clearly obtain franchises for allied products singly. Merely conditioning interchange authority on the existence of particular franchises does not create an illegal tie-in.

Coca Cola Company presented evidence that these programs enabled the company to allocate its advertising for all of its product lines in a particular area in a more efficient fashion. Thus, if Tab were selling particularly well in one area, the company could spend some of the Tab commitments on Sprite advertising in an attempt to increase consumer demand for that product. The jury could reasonably have found that this was a legitimate business practice.

d. *Miscellaneous Marketing Programs*

Bubble Up makes various other challenges to Coca Cola Company marketing practices. We have carefully examined the record evidence as to these programs, and concluded that they do not fall in the *per se* category. The evidence of exclusionary purpose and effect of these programs was conflicting and in each case the Coca Cola Company presented testimony tending to establish legitimate business justification for the practices questioned. The question of their purpose and effect was for the jury, and we find sufficient support in the record to uphold their verdict as to the Section 1 claims.

B. *Monopolization Claims Under Section 2*

The Coca Cola Company eventually secured Sprite franchises with about 85% of those independent bottlers also franchised for Coca Cola. Bubble Up contends that Coca Cola's success in franchising this group of bottlers for Sprite constituted monopolization of the relevant bottler market in violation of Section 2.[21] Coca Cola, on the other hand, argues that the relevant universe of bottlers is not limited. It claims that all independent bottlers were potential franchisees for Bubble Up in their quest to achieve national distribution. Therefore Bubble Up did not demonstrate that Coca Cola Company possessed sufficient monopoly power to violate Section 2. We think that the jury could properly have found that the relevant market consisted of all independent bottlers across the country,

[21] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U.S.C. § 2.

and, therefore we affirm the verdict favorable to the Coca Cola Company on the Section 2 claim.

The essence of the monopolization offense under Section 2 is "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 1966); Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., 438 F.2d 1286, 1304 (5th Cir. 1971), cert. denied, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). Monopoly power is "the power to control price or exclude competition." United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956); Turner, Antitrust Policy and the Cellophane Case, 70 Harv.L. Rev. 281, 288 (1956). Monopoly power does not exist in a vacuum. The antitrust plaintiff bears the burden to show the defendant possesses monopoly power in the relevant market. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177-78, 86 S.Ct. 347, 15 L.Ed.2d 247 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 795, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); Telex Corp. v. IBM, 367 F.Supp. 258, 335 (N.D.Okla.1975), rev'd on other gds., 510 F.2d 894 (10th Cir. 1975). Definition of the relevant market is basically a fact question heavily dependent upon the special characteristics of the industry involved. Telex Corp. v. IBM, 510 F.2d 894 (10th Cir. 1975); Acme Precision Products, Inc. v. American Alloys Corp., 484 F.2d 1237 (8th Cir. 1973); Cherokee Laboratories, Inc. v. Rotary Drilling Ser., Inc., 383 F.2d

97 (5th Cir. 1967), cert. denied, 390 U.S. 904, 88 S.Ct. 816, 19 L.Ed.2d 870 (1968).

The trial court below submitted the question of the relevant market to the jury with instructions.[22] Bubble Up now argues that, as a matter of law, the independent bottlers franchised for Coca Cola comprised the relevant market. Bubble Up further argues that the undisputed facts showed *per se* violations of various Sherman Act provisions, entitling Bubble Up to a directed verdict on the liability issues, and leaving only the question of damages for the jury.

We think that the trial court properly denied the motions for directed verdict and judgment n.o.v. Bubble Up and Sprite compete on two levels; both seek bottler franchises and consumer acceptance at the retail level. Testimony at trial showed that, when the Coca Cola Company introduced Sprite, lemon-lime drinks accounted for about 10-12% of total soft drink sales. Also, soft drink syrup manufacturers considered the lemon-lime segment of the soft drink market a separate segment of the retail market.[23]

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[22]Bubble Up did not object at trial to the relevant market instruction the trial court gave; nor does it challenge the adequacy of that instruction here.

[23]Calvin C. Stoddard, a Coca Cola employee, testified:

> The lemon-lime market accounted for 10 or 12 percent of the total market. We, the Coca Cola Company, did not have an entry there. We wanted Sprite as our entry in the lemon-lime market. We wanted to advertise it and put it in the home and cooler market.

Record Vol. 8 at 68. At the time the Coca Cola Company introduced Sprite, Mr. Stoddard was a district manager in Detroit, Michigan. He subsequently held various other positions with the company and was on the marketing staff for company owned plants at the time of trial.

Seven Up dominated the "green bottle" market with over 80% of total sales at the consumer level. To date, neither Bubble Up nor Sprite has been able to make substantial inroads on Seven Up's position in that submarket. Currently Sprite has about 11% of total consumer sales in the "green bottle" market. Sprite clearly did not have monopoly power at the consumer level, and Bubble Up does not claim otherwise.

Instead Bubble Up charges that Coca Cola illegally prevented it from obtaining sufficient bottler franchises to gain national distribution for its product by monopolizing the relevant market of soft drink bottlers. But evidence indicated that any independent bottler could effectively bottle and distribute Bubble Up. The soft drink bottling process is basically the same for all flavors. An independent bottler franchised for Pepsi Cola or Seven Up was still a potential franchisee as the independent bottlers in a given area were reasonably interchangeable. *See* United States v. Grinnel Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). Each of the 3500 independent bottlers made its own business decision on whether to bottle and distribute a lemon-lime drink, which lemon-lime syrup to purchase, and how many lemon-lime drinks to handle.

The fact that Bubble Up and the Coca Cola Company sought franchise agreements with the same group of independent bottlers does not limit the relevant market to those bottlers. Telex Corp. v. IBM, 510 F.2d 894 (10th Cir. 1975); Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1920). Both Bubble Up and Coca Cola sought to achieve nationwide

distribution of their lemon-lime soft drink at the consumer level. Evidence indicated that Bubble Up could reach the consumers in a given area through a franchise agreement with *any* independent bottler. The jury could properly have found that all 3500 were potential Bubble Up franchisees.[24] While Bubble Up showed that by 1967 the Coca Cola Company had secured Sprite franchise agreements with 787 of the 934 Coca Cola bottlers, those 787 bottlers represented only about 22% of 3554 independent bottlers. That is an insufficient market share to establish monopolization in violation of Section 2. *See* United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956); *cf.* United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); United States v. E. I. duPont de Nemours & Co., 351 (2d Cir. 1945). Thus the trial court properly denied Bubble Up's motion for judgment n.o.v. on the monopolization claim.

Bubble Up also charges that the Coca Cola Company attempted to monopolize and conspired to monopolize in violation of Section 2. The district court instructed the jury that "In order to determine whether the defendant has monopolized, attempted to monopolize, or combined to monopolize a particular field of competition, you must first determine what is the field of competition or relevant market." The court then defined the essential ele-

[24]Both parties agree that the relevant geographic market was the nation as a whole. That premise appears correct. *See* United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). The Coca Cola Company and the Bubble Up Company sought to market their syrup concentrate to independent bottlers in all areas of the country to achieve and maintain nationwide distribution at the consumer level.

ments of the attempted monopolization and conspiracy to monopolize offenses. Yet the jury found that Coca Cola had not violated Section 2. We find sufficient support in the record to uphold that finding.

The Supreme Court has defined attempt to monopolize as follows:

> The phrase "attempt to monoplize" means the employment of methods, means and practices which would, if successful accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it . . . .

American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S.Ct. 1125, 1127 (1946). The offense of attempted monopolization requires both specific intent to accomplish the illegal result (acquisition of monopoly power in the relevant market), and a dangerous probility of success in that endeavor. As Justice Holmes said:

> Intent is . . . essential to such an attempt [to monopolize]. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exist, [Section 2] . . . directs itself against that dangerous probability as well as against the completed result.

Swift & Co. v. United States, 196 U.S. 375, 396, 25 S.Ct. 276, 279, 49 L.Ed. 518 (1905). *See* Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951); American Tobacco Co. v. United States, *supra;* Scranton Const. Co. v. Litton Indus. Leas. Corp., 494 F.

2d 778 (5th Cir. 1974), cert. denied, 419 U.S. 1105, 95 S. Ct. 774, 42 L.Ed.2d 800 (1975); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969).

As noted above, the jury could properly have determined that the more than 3500 independent bottlers across the country comprised the relevant market for sale of lemon-lime soft drink franchises. No evidence indicated that the Coca Cola Company intended to give Sprite franchises to bottlers not franchised for Coke. We think the jury could have concluded that the Coca Cola Company did not have the specific intent to gain monopoly power in the relevant market. That obviates any inquiry into the probability that Coca Cola would succeed in gaining a monopoly position. *Cf.* Panotex Pipe Line Co. v. Phillips Petroleum Co., 457 F.2d 1279 (5th Cir.), cert. denied, 409 U.S. 845, 93 S.Ct. 48, 34 L.Ed.2d 86 (1972).

A similar analysis mandates approval of the jury's verdict on the combination or conspiracy to monopolize claim. Bubble Up had to convince the jury that Coca Cola Company and the groups of independent bottlers across the country who were franchised to bottle Coca Cola combined and conspired to prevent Bubble Up from obtaining the bottler franchises needed to achieve national distribution at the consumer level. American Tobacco Co. v. United States, 328 U.S. 781, 785-86, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946). Numerous witnesses testified to the business justifications for marketing Sprite through the bottlers already franchised for Coca Cola. The various incentive programs had business justifications as outlined above. Further, Coca Cola did not require bottlers to cease bottling Bubble Up as a condition to bottling Sprite. Viewing the evidence in the light most favorable to Coca Cola,

a jury could reasonably have found that Coca Cola did not have the specific intent to prevent Bubble Up from obtaining lemon-lime franchises in the relevant market composed of all independent bottlers. Again the fact that Bubble Up and Coca Cola chose to compete for the same group of bottlers does not limit the relevant market to that group. Since as a practical matter, most bottlers would only sign one lemon-lime franchise agreement, Coca Cola intended to franchise certain bottlers to the exclusion of Bubble Up. But the jury found that Coca Cola fought fairly and won. This is competition on the merits —the *summum bonum* of the Sherman Act. We affirm the denial of the motion for judgment n.o.v. on the attempt and conspiracy claims under Section 2.

III. MOTION FOR NEW TRIAL

Bubble Up alternatively sought a new trial on the following grounds: (1) the court improperly instructed the jury on the treble damages provisions of the antitrust laws; (2) defense counsel's improper jury argument; and (3) improper admission of irrelevant and prejudicial evidence. The trial court denied Bubble Up's motion, and Bubble Up asks that we overturn that decision.

Fed.R.Civ.P. 59 governs motions for new trial. That rule empowers a trial court to grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Decision on a motion for new trial requires an exercise of discretion by the trial court. United States v. Bucon Const. Co., 430 F.2d 420 (5th Cir. 1970); Commercial Credit Corp. v. Pepper, 187 F.2d 71 (5th Cir. 1951). The scope of appellate review of the trial court's

decision is narrow as the trial judge's discretion is broad, and reversal warranted only when he has abused it. Massey v. Gulf Oil Corp., 508 F.2d 92 (5th Cir. 1975); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2818 (1973). We have carefully reviewed the grounds asserted by Bubble Up in its motion for new trial in the context of the entire record. We find that the trial judge was well within the area of his discretion in denying a new trial.

Bubble Up complains vigorously of the trial court's action in instructing the jury that any damages awarded to Bubble Up would be trebled under the provisions of the antitrust laws. Bubble Up also complains of prejudice resulting from the jury argument of Coca Cola Company's counsel relative to the trebling provision.

At the time of the trial, the Fifth Circuit had not yet taken a definite position on the propriety of a treble damages instruction in an antitrust trial. Decisions in other jurisdictions conflicted.[25] The trial judge elected to give the instruction, but also told the jury that they were to assess damages based upon the actual loss incurred, if any.

The trial judge's actions constituted error under our subsequent decision in Pollock & Riley, Inc. v. Pearl Brewing Co., 498 F.2d 1240 (5th Cir. 1974). *See also* Wood v. Gulf Oil Corp., 498 F.2d 1240 (5th Cir. 1974), cert. denied, ... U.S. ....., 95 S.Ct. 1427, 43 L.Ed.2d 673 (1975). However, we feel that Bubble Up suffered no

[25] *Compare* Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) *and* Sablosky v. Paramount Film Distributing Corp., 137 F.Supp. 929 (E.D.Pa.1955) *with* Bordonaro Bros. Theaters v. Paramount Pictures, 203 F.2d 676 (2d Cir. 1953) *and* Cape Cod Food Prod. v. National Cranberry Ass'n, 119 F.Supp. 900 (D.Mass.1954).

prejudice from this error that would require a new trial. The jury specifically found no violations of Sections 1 and 2. As we have previously indicated, ample record evidence supports that determination. Since the jury found no liability, we do not regard the error in the damage instruction as sufficient basis for a new trial. We reach the same conclusion with regard to the complaint about defense counsel's jury argument relating to the trebling provision.

Bubble Up also seeks a new trial on the ground that the trial judge's action in admitting certain evidence relating to mismanagement and dissension in the Bubble Up Corporation denied it a fair trial. We think the trial court properly admitted the challenged evidence. It related to Coca Cola's position on the causation issue. The trial court properly admitted other evidence on Coca Cola Company's share of the lemon-lime consumer market as relevant to Coca Cola's theory of the case on the Section 2 monopolization claim. Bubble Up's motion for new trial on these grounds was properly overruled.[26]

CONCLUSION

This was a hotly contested eight week jury trial. Both parties presented their positions forcefully and thoroughly in the court below. The jury heard the evidence, and rendered its verdict after receiving comprehensive instructions from the trial judge. We have carefully considered Bubble Up's claims of error, but reject all of them. The jury's verdict must stand.

Affirmed.

[26] Since we uphold the jury's verdict absolving Coca Cola Company of any antitrust liability, we do not consider Bubble Up's complaint of improper exclusion of evidence relating to damages.

Appendix B

United States District Court
Northern District of Georgia
Atlanta Division

Civil Action No. 11,856

Irving Sulmeyer, et al
Versus
The Coca-Cola Company

[Filed Nov. 3, 1972]

ORDER

Judgment was entered on August 2, 1972, pursuant to a jury verdict in favor of the defendant, The Coca-Cola Company. In responding to special interrogatories, the jury found that the defendant had not violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and that the plaintiff, Bubble Up Corporation, had not been injured as a result of any antitrust violations. Pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, the plaintiff now moves for a Judgment Notwithstanding the Verdict and/or a New Trial.

Judgment N.O.V.

The plaintiff moved for directed verdict at the close of all the evidence. The court denied the motion and sub-

mitted the case to the jury. Within ten (10) days after entry of the judgment, the plaintiff filed the motion *sub judice* to set aside the verdict and judgment, and to have judgment entered in accordance with its motion for directed verdict. Rule 50(b) Fed.R.Civ.P.

A motion for judgment notwithstanding the verdict in effect renews an earlier motion for directed verdict, and the applicable judicial standard is the same for both. *United States v. Simmons,* 346 F.2d 213 (5th Cir. 1965). Such a judgment should be entered only when there can be but one reasonable conclusion as to the proper judgment. *Brady v. Southern Railroad,* 320 U.S. 476, 64 S.Ct. 232 (1943); *Powell v. Lititz Mutual Life Insurance Co.,* 419 F.2d 62 (5th Cir. 1969). Where there is conflicting evidence, or insufficient evidence to make a one-way verdict proper, judgment n.o.v. should not be granted. *Banks v. Ass. Indemn. Corp.,* 161 F.2d 305 (5th Cir. 1947). In determining whether the evidence is sufficient the court is not free to weigh the evidence or pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury. Instead, the court must view the evidence in a light most favorable to the defendant, Coca-Cola Company, here and give that party the benefit of all reasonable inferences from the evidence. Wright and Miller, *Federal Practice and Procedure: Civil* §2524.

The plaintiff urges that judgment notwithstanding the verdict must be granted because the uncontradicted facts reveal several grounds for judgment n.o.v. and the plaintiff is entitled to judgment as a matter of law. As the first ground, the plaintiff contends that the Coca-Cola Company's introduction of the product "Sprite" was

based upon the *per se* unlawful foundation of territorial divisions.

The plaintiff claims that the undisputed facts show that the restrictions on territory were the product of the "parent" bottlers, and did not originate vertically from the Coca-Cola Company. Such horizontal divisions of territory, the plaintiff urges, are unlawful *per se. Timken Roller Bearing Co. v. United States,* 71 S.Ct. 971, 341 U.S. 593 (1951); *Addyston Pipe and Steel Co. v. United States,* 85 F. 271 (1898), *affirmed,* 175 U.S. 211 (1899).

In the alternative, the plaintiff insists that even if the restrictions are considered vertical in nature, they are *per se* unlawful under *United States v. Arnold Schwinn & Co.,* 87 S.Ct. 1856, 388 U.S. 365 (1967).

The court cannot agree with the defendant's attempt to distinguish *Schwinn* as involving price fixing[1] or its analysis of Schwinn as a "rule of reason" case.[2] However, it is clear that the question of territorial restrictions did receive full consideration at the trial (over the defendant's objections as to relevancy) and, apparently, the plaintiff failed to establish to the jury's satisfaction that these territorial provisions had any effect on the bottlers' decisions to bottle "Sprite" or to drop "Bubble-Up." Any

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[1]"Nor is this a case of territorial or dealer restrictions accompanied by price fixing, for here the issue of unlawful price fixing was tendered, litigated, decided against the appellant, and appellant has not appealed". 388 U.S. at 373, 87 S.Ct. at 1862.

[2]"Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred . . . is a per se violation of §1 of the Sherman Act." 388 U.S. at 382, 87 S.Ct. at 1867.

evidence of a causal connection was circumstantial in nature, and the jury found in favor of the defendant.

As a second ground for judgment n.o.v., the plaintiff claims that the Investment Market Program, and introductory program of Sprite for the years 1961 through October of 1963, was a per se unlawful tying arrangement and constituted a *per se* unlawful group boycott.

Any evidence of an illegal combination in the nature of a group boycott was circumstantial in nature. There was testimony that the defendant made no effort to persuade bottlers to drop "Bubble Up." There was also evidence that the Investment Market Program was designed to utilize television as an advertising medium, and that, since the television signal area usually extended beyond any one bottler's territory, it was not economically feasible to spend money or television advertising of "Sprite" until the product was available to a substantial portion of the population covered by the television signal.

All the circumstantial evidence was before the jury, but they failed to find an illegal combination in the nature of a group boycott.

It is clear that the Investment Market Program conditioned large amounts of extra advertising credits on the bottlers, who bottled "Sprite" serving at least eighty (80) percent of any television signal area. Under the plaintiff's theory, this condition constituted a *per se* illegal tying arrangement under *Fortner Enterprises, Inc. v. United States*, 89 S.Ct. 1252, 394 U.S. 495 (1969).

In *Fortner* the plaintiff was loaned money on the condition that he use the defendant's product. The plaintiff argues that the present case is even stronger than *Fortner*, since the additional credit was not only conditioned on the bottler taking on "Sprite", but also that the bottler combine, sooner or later, with other bottlers serving at least eighty (80) percent of a television signal area.

It is true that *Fortner* found "no basis for treating credit different in principle from other goods and services", 89 S.Ct. at 1261, and that "tie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent. . . ." However, the Supreme Court in *Fortner* remanded the case to the District Court for a trial on its merits, stating "that the petitioner raised questions of fact which if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." 89 S.Ct. at 1257.

The case at bar was tried on its merits before a jury and the jury was instructed on tying arrangements at the plaintiff's request. The plaintiff raised no objection to that portion of the charge. The jury, after weighing the evidence, found no illegal tying arrangement in violation of the Sherman Act. Accordingly, the plaintiff's present reliance on *Fortner* is misplaced.

In further support of its motion for judgment n.o.v., the plaintiff calls attention to the fact that the Coca-Cola Company initiated other programs following the 1961-1963 Investment Market Program which were allegedly unlawful, in and of themselves including: (1) the Equipment Lending Program, (2) tying "Sprite" to cash bonuses for increased sales of Coca-Cola, (3) television co-operatives conditioning matching funds on the purchase of "Sprite", (4) permitting advertising funds allocated to Fanta products to be used to advertise "Sprite", (5) the three month

program in 1965 whereby Coca-Cola offered to pay 100% introductory and advertising costs for any bottler who introduced "Sprite", and (6) the extra 20 cent per gallon allowance in addition to the contract allowance on certain conditions.

After due consideration, and in view of the foregoing standards to be applied on a motion for judgment n.o.v., this ground must be denied.

Finally, the plaintiff urges that the undisputed facts show the Coca-Cola Company attempted to monopolize, combined to monopolize, and did in fact monopolize the lemon-lime market of the bottlers of Coca-Cola. This argument rests on the definition of the relevant market. The plaintiff maintains that the relevant market is composed of the bottlers of Coca-Cola, while on the other hand, the defendant insists that the relevant market covers the entire lemon-lime segment of the soft drink industry.

Although some uncertainty exists as to whether the question of relevant market is one of fact for the jury or one of law for the court, the jury in this case was instructed on Section 2 of the Sherman Act and on the relevant market. The plaintiff made no objection to this portion of the charge. The jury found the defendant not to be in violation of Section 2 and such a conclusion was supported by the evidence. Accordingly, this ground is without merit.

New Trial

The plaintiff urges three principal grounds in support of a motion for new trial. First, the plaintiff attacks portions of the defendant's argument to the jury as improper. In its argument to the jury, the defendant referred to the fact that damages would be trebled by the court. The plaintiff claims that such an argument was improper and prejudicial. For reasons hereinafter set forth respecting the instruction to the jury on trebling of damages, the plaintiff's claim is rejected.

The remaining objections to the other portions of the defendant's argument are unfounded and without merit.

As a second ground for a new trial, error is claimed on the court's instruction to the jury that any damages would be trebled by the court.

While there is a division of authority over whether it is proper for the trial court to instruct the jury that its award would be trebled,[3] the Fifth Circuit Court of Appeals in the case of *North Texas Producers Assn. v. Young*, 308 F.2d 235 (5th Cir. 1962) reviewed such an instruction and held it to be permissible.

Furthermore, even if the instruction in the present case were erroneous, the error would be harmless. The jury found the defendant to have committed no antitrust violations. Consequently, the jury did not reach the question of damages, and the charge on treble damages could not have prejudiced the plaintiff.

The third assignment of error in support of the motion for new trial claims that the admission of certain evidence pertaining to the activities and conduct of Leonard Key, a former official of the plaintiff, was irrelevant and prejudicial. Clearly, evidence relating to the activities of Mr.

[3]See, *Semke v. Enid Automobile Dealers Assn.*, 456 F.2d at 1370 n. 11 (10th Cir. 1972).

Key is relevant both to the defense of mismanagement and the issue of proximate cause. Accordingly, this claim is without merit.

Finally, the plaintiff contends that the court erroneously admitted other alleged irrelevant evidence. Without referring specifically to each ground thereof, the court has considered each of these claims carefully and concludes that they are likewise without merit.

Accordingly, for the foregoing reasons, the plaintiff's motion for judgment notwithstanding the verdict and alternative motion for new trial is hereby denied.

So ordered this the 3rd day of November, 1972.

/s/ Albert J. Henderson, Jr.
Judge, United States District Court
for the Northern District of Georgia

Appendix C

(Letterhead of
United States Court of Appeals
Fifth Circuit
Office of the Clerk
600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514)

September 24, 1975

To All Counsel of Record

No. 73-2231—Irving Sulmeyer & Arnold L. Kupetz, etc.
vs. Coca-Cola Company

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
Edward W. Wadsworth, Clerk
by /s/ Clare F. Sachs
Deputy Clerk

cc: Messrs. Joseph M. Alioto
Lawrence J. Appel
Joseph L. Alioto
Messrs. Glover McGhee
Clayton H. Farnham
Mr. Lawrence J. Morena
Messrs. Charles L. Gowen
Hugh Peterson, Jr.
Jack H. Watson, Jr.
Mr. David Vaughan

Appendix D

STATUTES INVOLVED

(1) 15 U.S.C. § 1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(2) 15 U.S.C. § 2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

(3) Federal Rules of Civil Procedure, Rules 50 (a) and (b) provide:

"*(a) Motion for Directed Verdict: When Made; Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any

reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."